Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE, Director
Illinois Department of Corrections,

Petitioner,

v.

LAWRENCE WILLIAMS AND OSCAR SOUTHALL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with the decision of this Court in *United States v. Timmreck*.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents have no disagreement with petitioner's Statement of the Case regarding either respondent Williams or respondent Southall. Respondents only add that Williams first learned of the existence of the mandatory parole term over a year after he was sentenced (J.A. 12) and that Southall was similarly unaware of the existence of the mandatory parole term. (J.A. 65)

SUMMARY OF ARGUMENT

The decision of this court in *United States v. Timmreck*, 441 U.S. 780 (1979) is inapplicable to the instant case, in that the cases are distinguishable both factually and legally. In addition, while *Timmreck* involved only a technical violation of Rule 11 of the Federal Rules of Criminal Procedure, the instant case involves the breach of a plea agreement which was the basis for a plea of guilty. Guilty pleas induced by unfulfilled promises have long been considered involuntary and in violation of an accused's right to due process of law. *Santobello v. New York*, 404 U.S. 257 (1971); *People v. Washington*, 38 Ill.2d 446 (1967). The Court of Appeals for the Seventh Circuit correctly noted these differences and affirmed the decision of the District Court granting the petitions for writ of habeas corpus. This judgment should be affirmed.

ARGUMENT

THERE IS NO CONFLICT BETWEEN THIS COURT'S DECISION IN *UNITED STATES v. TIMMRECK* AND THE COURT OF APPEAL'S DECISION IN THE INSTANT CASE.

A. The Rationale Of *United States v. Timmreck* Is Inapplicable To The Instant Case.

While respondents have no basic disagreement with petitioner's decription of the facts of *United States v. Timmreck,* 441 U.S. 780 (1979), there are several important differences between the *Timmreck* case and the instant case which cause that decision to be inapplicable here. Defendant Timmreck pleaded guilty to the charge of conspiracy to distribute controlled substances in the federal district court. Addressing the defendant as required by Rule 11 of the Federal Rules of Criminal Procedure, the district court advised Timmreck of the maximum penalty, 15 years imprisonment and a fine of $25,000, but failed to describe the mandatory special parole of at least 3 years. The district court accepted Timmreck's gulty plea, and, at a later proceeding, sentenced Timmreck to ten years imprisonment, a $5,000 fine, and a special parole term of five years. No ojection was made to the sentence and no appeal was taken from the judgment.

Two years later, Timmreck moved to vacate the sentence pursuant to Title 28 U.S.C. §2255 on the ground that the trial court violated the terms of Rule 11 in not advising him of the mandatory parole term at the time he pleaded guilty. There was no contention by Timmreck that he did not know of the mandatory parole or that he would not have pleaded guilty had he known of the mandatory parole. Timmreck's only claim was a technical violation of Rule 11, which could, and should, have been raised by direct appeal.

Unlike defendant Timmreck, the respondents herein were not advised at any proceeding of a mandatory parole term. Petitioner Williams did not learn of the existence of the mandatory parole term until well over a year after he was

sentenced, and approximately two months before his discharge date. (J.A. 12) Likewise, while respondent Southall did not state the exact date on which he learned of mandatory parole term, his petition for writ of habeas corpus stated that he did not appeal from the judgment of conviction or the imposition of sentence because he was not aware that he could or would be required to serve mandatory parole. (J.A. 65) Unlike Timmreck, neither Williams nor Southall were informed at the change of plea proceedings and contemporaneous sentencing that their sentences included a mandatory parole term.

Finally, there was no prejudice to Timmreck from the failure to comply with the formal requirements of Rule 11. Timmreck was actually sentenced to the parole term by the trial court. In the instant case, however, respondents were unknowingly subjected to a substantially greater term than they were actually sentenced to serve. Both were given three year terms in addition to their *agreed upon* sentences. Such an error is not a technical violation, but rather, a violation of respondents' rights to due process of law.

Contrary to the petitioner's assertion that the "gist of this Court's holding *[inTimmreck]* was that a violation of Rule 11 is neither constitutional nor jurisdictional, (Pet. Brf., p. 15) the essence of the *Timmreck* decision is a reaffirmation of the long standing principle that:

> So far as convictions obtained in the Federal Courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal. *Sunal v. Large,* 332 U.S. 174, 178 (1947).

Such collateral attacks, as in *Timmreck,* have been particularly disfavored by this Court. "It is plain, however, that the writs is not designed for collateral review of errors of law committed by the trial court." *Sunal v. Large, supra,* at 179.

Mr. Justice Stevens, writing for a unanimous Court in *Timmreck,* specifically noted that defendant Timmreck did not argue that he was actually unaware of the special parole term or that if he had been properly advised by the trial judge, he would not have pleaded guilty. Rather, Timmreck's only claim was of a technical violation of Rule 11.

> That claim could have been raised on direct appeal, [Citation omitted] but was not. And there is no basis here for allowing collateral attacks "to do service for an appeal." *Sunal v. Large,* 332 U.S. 174, 178. 441 U.S. at 784.

Mr. Justice Stevens went on to limit the holding in *Timmreck*, just as the Court had done in *Hill v. United States,* 368 U.S. 424 (1962).[1]

> As in *Hill,* we find it unnecessary to consider whether §2255 relief would be available if a violation of Rule 11 occured in the context of other aggravating circumstances. "We decide only that such collateral relief is not available when all that is shown is the failure to comply with the formal requirements of the rule." 368 U.S. 429, 441 U.S. at 785.

No similar claim, that respondents have waived their right to challenge the mandatory parole term by writ of habeas

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[1]In *Hill v. United States, supra,* defendant Hill sought relief under §2255 where he was not permitted, as required by Rule 32(a) of the Federal Rules of Criminal Procedure, to make a statement on his own behalf at sentencing. This Court affirmed the denial of the motion on the ground that absent a "fundamental defect which inherently results in a complete miscarriage of justice," such errors are not cognizable in the absence of any prejudice to the petitioner. Indeed, in *Hill,* it was not even alleged that the petitioner would have said anything if allowed to. Hence the defect was neither fundamental nor did it result in a miscarriage of justice.

corpus, has ever been raised in the instant case by petitioner, nor is such claim raised here. Rather, it is clear that respondents did not discover the existence of the mandatory parole term until after the time to appeal had run. Thus, the waiver problem apparent in *Timmreck* is not present in the instant case.

Aside from this fundamental difference between the two cases, there is another substantial difference between *Timmreck* and the instant case, the difference between the terms of the plea agreement. In *Timmreck*, the terms of the plea bargain with the prosecutor were that Timmreck would plead guilty to a charge of conspiracy to distribute various controlled substances in exchange for dismissal of other charges pending against him. 441 U.S. at 782. This bargain was kept by the prosecutor.

In the instant case, on the other hand, respondent Williams agreed to plead guilty to a single charge of burglary in exchange for an indeterminate sentence of one to two years in the Illinois penitentiary. The terms of this agreement were accepted by the trial court. (J.A. 25). Similarly, respondent Southall agreed to plead guilty to one count of burglary in exchange for an indeterminate sentence of one to three years in the Illinois penitentiary, which agreement was reached in the presence of, and with the approval of the trial judge. (J.A. 74-77) In neither case were the terms of the agreement lived up to by the State.

Instead, after respondents arrived at their designated institutions, they discovered that they would be subject to additional three year mandatory parole terms which were not part of their agreements with the prosecutor or the court. The flaw involved in the instant case is far more severe than the mere technical violation of Rule 11 alleged in *Timmreck*. The flaw here is the failure of the State to live up to its

agreements. Where liberty and the rights attendant to one accused of a crime are the price paid for a specific sentence, it is absolutely essential that persons such as respondents herein have a meaningful avenue to enforce such agreements. The District Court and the Court of Appeals correctly provided that avenue in the instant case. That decision should be affirmed.

B. The Failure To Admonish Respondents As To The Mandatory Parole Terms Constituted A Violation Of Their Due Process Rights.

Petitioner relies on the assertion that the "flaw" in the rationale of the Court of Appeals was its failure to understand that the lack of admonition to the mandatory parole term is, "at most, a failure to comply with the dictates of Illinois Supreme Court Rule 402, Ill. Rev. Stat. 1975, Chapter 110, §402." (Pet. Brf., p. 18) Petitioner finds support for this statement in *People v. Wills,* 61 Ill.2d 105 (1975), wherein the Illinois Supreme Court held that the failure to advise the defendant Wills of the mandatory parole term did not involve a constitutional issue. Respondents, however, submit that this rationale is itself "flawed" in two respects. First, as noted above, (Resp. Brf., pp. 3-7) there are several important factual differences between the instant case and *Timmreck* inapplicable here. Second, petitioner's position ignores previous case law which established a constitutional standard for accepting guilty pleas based on plea agreements, and subsequent case law which has altered the effect of *People v. Wills, supra.*

The plea bargining process has long been the skeleton in the closet of the criminal justice system. While tacitly recognizing the existence of the procedure, courts attempted

to look the other way when guilty pleas were actually entered. *See, e.g., Blackledge v. Allison,* 431 U.S. 63, 76 (1977) The importance of guilty pleas for both the accused and the State eventually could not be overlooked, and the integrity of plea bargaining agreements came to the forefront. In *Machibroda v. United States,* 368 U.S. 487 (1962), this Court held:

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. [Citations omitted] "A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the Court has nothing to do but give judgment and sentence. Out of just considerations for persons accused of crimes, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States,* 274, U.S. 220, 223. 368 *U.S. at 493.*

Following the decision in *Machibroda,* in *Boykin v. Alabama,* 395 U.S. 238 (1969) and *Brady v. United States,* 397 U.S. 742 (1970), this Court emphasized that for a guilty plea to withstand appellate or post-conviction review, the record must affirmatively disclose that the plea was entered understandingly and voluntarily. *Brady v. United States, supra,* at 747, n.4; *Boykin v. Alabama, supra,* at 242. Indeed, a waiver of the panoply of rights guaranteed to an accused must not only be voluntary, but also must be a knowing and intelligent act done with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, supra,* at 748. As noted by petitioner, the Illinois legislature sought to ensure that any

such waiver would be voluntary when it amended Illinois Supreme Court Rule 402 in 1970 to require compliance with the requirements of *Boykin v. Alabama, supra,* and to give "visibility to the plea agreement process and thus provide the reviewing court with a record containing an accurate and complete account of all relevant circumstances surrounding the guilty plea." *Committee Comments, 50 Ill.2d R.402 (June, 1970).*

One year later, in *Santobello v. New York,* 257 (1971), this Court openly recoginzed plea bargaining agreements.

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. 404 U.S. at 260-261.

After noting the benefits to both the accused and society, the Court continued:

> However, all these considerations presuppose fairness in securing agreement between an accused and the prosecutor. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. . . .
>
> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a

> promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 404 U.S. at 261-262.

Thus, not only must the defendant receive the benefit of his bargain, but also, he must have an avenue to enforce the terms of any such agreement. The same principle was recognized by the Illinois Supreme Court in *People v. Washington,* 38 Ill.2d 446 (1967). Any plea of guilty which is induced by unfulfilled promises loses its voluntary nature and should be considered void. 38 Ill.2d at 449-450.

In 1975, the Illinois Supreme Court was faced with a case factually similar to *United States v. Timmreck, supra.* In *People v. Wills,* 61 Ill.2d 105 (1975), defendant Wills pleaded guilty to the offenses of burglary, escape and armed robbery. There is no indication, however, whether Wills pleaded guilty pursuant to plea agreements. Wills was sentenced to concurrent sentences of 3 to 9 years for burglary, 3 years and 4 months to 10 years for escape, and 5 to 30 years for armed robbery. Wills was not advised that a mandatory parole term attached to the sentences for burglary and escape, however, he was advised by the trial court that a five year mandatory parole term would attach to the sentence for armed robbery. 61 Ill.2d at 108. While the Illinois Supreme Court affirmed the judgments of conviction on the ground that Wills had been admonished concerning the mandatory parole provision, the court reconsidered its previous position in *People v. Krantz,* 58 Ill.2d 187, 195 (1974), and held that compliance with Illinois Supreme Court Rule 402(a)(2) requires that a defendant must be admonished that the mandatory period of parole pertaining to the offence is a part of the sentence that will be imposed and that he can be held subject to the jurisdiction of the Parole and Pardon Board for a period of

time equal to the maximum term of imprisonment provided in the indeterminate sentence and the parole term. 61 Ill.2d at 109. In a supplementary decision, the Court added that this change was to be considered a procedural change not involving a constitutional issue or standard, and that the requirement of admonition as to the mandatory parole term would apply prospectively.

Since the ruling in *People v. Wills, supra,* several courts have had the opportunity to review pleas of guilty which were attacked on the ground that there was a failure to advise the defendant of the mandatory period of parole. In *United States ex rel. Baker v. Finkbeiner,* 551 F.2d 180 (7th Cir. 1977), on a petition for writ of habeas corpus, the Court of Appeals for the Seventh Circuit held that the petitioner's right to due process of law had been violated. Petitioner Baker pleaded guilty pursuant to a plea agreement between his attorney and the prosecutor. No mention was made by the court, the prosecutor, or the defense attorney of any mandatory period of parole.[2] Ruling that a failure to admonish Baker constituted a deprivation of his right to due process of law, the Court of Appeals noted:

> [Baker] agreed to plead guilty in exchange for the promise of specific sentence by the prosecutor, which was then ratified by the trial judge. Yet he was given a more onerous sentence than he had been promised. . . .

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[2]Since Baker's plea was taken prior to May 19, 1975, the date on which *People v. Wills, supra,* was decided, the *Wills decision had no effect on this case.*

> The correct test to be used in determining whether the circumstances surrounding Baker's negotiated guilty plea violated the Due Process Clause is that the plea must withstand collateral attack unless the sentence actually imposed upon Baker significantly differs from the sentence which the prosecutor and the trial court promised him. 551 F.2d at 183.

Noting that the imposition of a two year parole term was indeed, a significant punishment, the court held that fundamental fairness demanded that the State be compelled to adhere to its agreement as well as the petitioner, citing *Santobello v. New York,* 404 U.S. 257, 261-263 (1971). In a companion case, *United States ex rel. Ferris v. Finkbeiner,* 551 F.2d 185 (7th Cir. 1977), *cert. denied sub nom. Rowe v. Ferris,* 435 U.S. 932 (1978), the Court of Appeals held that where a petitioner pleaded guilty pursuant to a plea agreement and was affirmatively, but incorrectly, advised by the trial court that he would not have to serve the mandatory five year parole term, his right to due process of law had been violated.

Subsequently, in *People v. McCoy,* 74 Ill.2d 398 (1979), the Illinois Supreme Court concurred with the holdings of the Court of Appeals in *United States ex rel. Baker v. Finkbeiner, supra,* and *United States ex rel. Ferris v. Finkbeiner, supra.* The Illinois Supreme Court, however, distinguished *McCoy* from both *Baker* and *Ferris* because defendant McCoy neither alleged nor asserted that he had been promised anything more than a recommendation that he be sentenced to an indeterminate term of one to three years.

> The facts here are, however, clearly distinguishable [from the facts in *Baker* and *Ferris*]. It was not alleged in the amended post-conviction petition, nor asserted in

> defendant's brief, that defendant was promised anything more than a recommendation that the sentence be 1 to 3 years. In contrast, in *Baker* there was an agreement that the prison sentence would be 1 to 2 years (551 F.2d 180, 181) and in *Ferris* the defendant, in response to an inquiry directed to the court, was erroneously advised concerning the mandatory period of parole. 74 Ill.2d at 404.

Thus, the Illinois Supreme Court recognized that in cases where a defendant pleads guilty pursuant to a negotiated plea agreement, there is more than a technical violation of a court rule. There is, in fact, a denial of a substantial right which robs the plea of its voluntary character.

Following *People v. McCoy, supra,* the Court of Appeals for the Seventh Circuit agreed with the decision of the Illinois Supreme Court in *United States ex rel. Williams v. Morris,* 594 F.2d 614 (7th Cir. 1979).

> *McCoy* considers our holding in *Baker* and in *Ferris* and properly distinguishes them on the basis that in *Baker* there was an agreement, and in *Ferris* the defendant was misinformed that he would not have to serve a mandatory parole term. 594 F.2d at 619.

The Court of Appeals utilized the same rationale in its decision in the instant case. *United States ex rel. Williams v. Morris,* 663 F.2d 71 (7th Cir. 1980) (J.A. 50-52). The court correctly concluded that the instant case was distinguishable from *United States v. Timmreck, supra,* and that more than a technical violation of a procedural rule was involved. The court found no reason to reexamine its decision in *United States ex rel. Baker v. Finkbeiner, supra,* as requested by petitioner, and correctly held that respondents, like petitioner Baker, had been deprived of the benefit of their plea bargains in violation of the Due Process Clause. This decision should be affirmed.

C. Neither Considerations Of Comity, Finality Of Judgments, Nor Of Federalism Dictate That Respondents Should Not Be Allowed To Collaterally Attack Their Guilty Pleas By Writ Of Habeas Corpus.

As a final argument, petitioner contends that considerations of comity, finality of judgments, and federalism should prevent respondents from collaterally attacking their guilty pleas by writ of habeas corpus. This argument is difficult to comprehend in light of the seriousness of respondents' claims and the prejudice that would inure to them if they were not allowed an avenue to enforce their agreements with the state. Under petitioner's rationale, finality of judgments would take precedence over considerations of justice and fair play. Such a view defeats the purpose of the writ of habeas corpus.

> Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. *Harris v. Nelson,* 394 U.S. 286, 290-291. "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." *Price v. Johnston, supra,* at 269. And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody. *Blackledge v. Allison,* 431 U.S. 63, 72 (1977).

Those problems cited by petitioner, also from *Blackledge v. Allison, supra.* at 71, are simply not present in the instant case. There is no danger of vacating a judgment of conviction and forcing the state to retry the case years later. Rather than having "nothing to lose" from filing a collateral attack upon

his guilty plea, respondents herein would be substantially prejudiced if they did not collaterally attack the imposition of the mandatory parole terms. Respondents seek only what they bargained for and agreed to, nothing more. In cases of this nature, guilty pleas have not been set aside. The court has merely enforced specific performance of the State's bargain by excising the mandatory parole term.

Finally, petitioner's suggestion that principles of comity and federalism should prevail in the instant case smacks of a judicial repeal of § 2254 of the Judicial Code and Judiciary, Title 28 U.S.C. §2254 (1948). Congress saw fit to preserve the great writ over thirty years ago. The grave step suggested here by petitioner whould only be undertaken by Congress. The situation in the instant case is in no way analagous to the requirement of exhaustion of available state remedies. These respondents have no such remedy. (J.A. 46) Thus, they would be precluded from any remedy for violation of constitutional rights. In such a case, no interest, state or federal, is served.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Seventh Circuit granting respondent's petitions for writ of habeas corpus.

Respectfully submitted,

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